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Supreme Court of the United States

October Term, 1996

LENORA SPAIN, LOUIS HOMESY, WALTER KOZA, THOMAS RICHARD, WILLIAM NAULT, MATTHEW DEMAS, MICHAEL ADAMS, MICHAEL GROVE, LISA HAWKINS, GARY CASTIGLIONI, CHERYL ADAMS, THOMAS RICHARD, MELISSA RAPA, RICHARD WAUGH, WELDON ADAMS, RONALD RING, PATRICIA ADAMS, ELIZABETH TARGEE, MATHEW VAN WINKLE, BRENT ADAMS, ROBERT RAVITZ, TINA LEVESQUE, CARRIE BURKE, WILLIAM CONNORS, DAVID TAYLOR, CHRISTOPHER MORRIS and KATHLEEN MARTINS,

Petitioners,

vs.

DEMETRIOS HASEOTES, JOHN DROLETTE, ROBERT LANGFORD, JAMES MUMMA, APRIL GREEN, LILLY BENTAS, BYRON HASEOTES, JOHN PECK, GEORGE HASEOTES, PETER PANTAZELOS, MARK CURRIER, MARGE OLSEN, WENDY OLSEN, DENNIS O'SULLIVAN, FRANCIS LOCKLIN JR., FRED BEISSNER and HARRIET ANTHONY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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APPENDIX

Appendix A — Memorandum And Order Of The United States District Court For The District Of Massachusetts In The Matter Of *Ronald Ring, et al. v. Demetrios Haseotes, et al.*, No. 93-10051-H Dated April 23, 1993	1a

Respondents request that the Court deny the petition for certiorari seeking review of a judgment of the United States Court of Appeals for the First Circuit primarily because, as set forth below, the Court of Appeals correctly concluded that the claims of 11 of the Petitioners are barred by the settlement and final order in *Curley v. Cumberland Farms, Inc.*, Civil Action No. 86-5057 (D.N.J. 1993), and correctly concluded that the claims of the remaining Petitioners are barred for the reasons relied upon by the district court in its decision dated August 9, 1995.

STATEMENT OF THE CASE

A. Procedural History

Petitioners seek review of two decisions of the Court of Appeals dated, respectively, September 4, 1996 (Petition at 4a), and June 9, 1997 (Petition at 1a). The order dated September 4, 1996 summarily dismissed the appeals of 11 of the Petitioners from a judgment of the District Court for the District of Massachusetts dated May 2, 1995 (Petition at 13a), dismissing their lawsuit against the Respondents. These 11 Petitioners ("11 Petitioners") filed a motion for rehearing with the Court of Appeals on May 29, 1997, which motion was denied on September 5, 1997. The order dated June 9, 1997 dismissed, per curiam, the appeals of the remaining Petitioners ("remaining Petitioners"), based essentially upon the reasons given by the district court in its order dated August 9, 1995 (Petition at 1a, 7a). The motion of the remaining Petitioners for rehearing was denied by the Court of Appeals on September 3, 1997.

B. Statement of Facts[1]

The Petitioners (or various combinations of them) commenced a total of eight (8) lawsuits against the Respondents, in the state and federal courts in Massachusetts:

1. *Cheryl Adams v. Cumberland Farms, Inc., et al.*
   Essex Superior Court, Docket No. 91-231
   (hereinafter "*Adams I*")

2. *Richard Waugh, et al. v. Haseotes, et al.*
   Suffolk Superior Court Docket No. 93-2663
   (hereinafter "*Waugh*")

3. *Cheryl Adams v. Burke, et al.*
   Suffolk Superior Court Docket No. 94-0627-B
   (hereinafter "*Adams V*")

4. *Ronald Ring, et al. v. Haseotes, et al.*
   U.S.D.C. Docket No. 93-10051H
   (hereinafter "*Ring*")

5. *Lenora Spain, et al. v. Haseotes, et al.*
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   (hereinafter "*Spain*")

6. *Cheryl Adams, et al. v. Burke, et al.*
   U.S.D.C. Docket No. 94-10229 JLT
   (hereinafter "*Adams VI*")

7. *Eric Judson, et al. v. Cumberland Farms, Inc., et al.*
   Norfolk Superior Court Docket No. 94-12536
   (hereinafter "*Judson*")

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1. The Statement of Facts in the petition is inaccurate in a number of respects, none of which are material to the Court's disposition of the petition, for the reasons set forth below, under "Argument."

8. *Laetitia Salvatore, et al. v. Cumberland Farms, Inc., et al.*
   U.S.D.C. Docket 95-11170-EFH
   (hereinafter "*Salvatore*")

The eight lawsuits alleged essentially the same claims, arising out of the same transactions. Judgments of dismissal have entered in all eight of these lawsuits. The instant petition concerns only the *Spain* case. However, the 11 Petitioners have previously sought certiorari from the judgments of dismissal in *Adams I, Waugh* and *Adams V*. That petition, docketed as No. 96-1782, was denied by the Court on October 6, 1997. *Cheryl Adams v. Cumberland Farms,* __ S. Ct. __, 1997 WL 274814 (Oct. 6, 1997). The Court's attention also is respectfully directed to the denial of certiorari and to the statement of facts and procedural history set forth at pp.1-5 of the Opposition to Petition For Writ Of Certiorari in *Adams v. Cumberland Farms, Inc.*, 86 F.3d 1146 (1st Cir. 1996), *cert. denied*, 117 S. Ct. 387 (Nov. 4, 1996), all or most of which is relevant to consideration of the Petition in this case. Copies of the decisions which are referenced immediately below were included in the appendices of the petitions and the oppositions to the petitions for certiorari in No. 96-300 and No. 96-1782.

The Petitioners are all former employees of Cumberland Farms, Inc. ("CFI"). In 1986, certain other former employees of CFI commenced suit against the company in the United States District Court for the District of New Jersey, which lawsuit was styled *Lance Curley, et al. v. Cumberland Farms, Inc., et al.*, Civil Action No. 86-5057 (SSB). The plaintiffs in *Curley*, like the Petitioners in this case, alleged injuries arising out of their employment with CFI, which they attributed to misconduct by CFI's loss prevention personnel.

In 1991, CFI filed for protection from creditors pursuant to Chapter 11 of the Bankruptcy Code, in the United States

Bankruptcy Court for the District of Massachusetts. *In re Cumberland Farms, Inc.*, Case No. 92-41305-JFQ.

In 1993 CFI reached an agreement with the plaintiffs in *Curley* to settle the so-called "loss prevention claims" on a class-wide basis. As part of the proposed settlement, the parties to that action filed a joint motion in the bankruptcy court requesting the creation of a mandatory class that would consist of all "loss prevention claimants." The bankruptcy court, over the objection of the 11 Petitioners, granted the joint motion. The 11 Petitioners appealed this order of the bankruptcy court to the United States District Court for the District of Massachusetts, which affirmed. On May 6, 1996, the First Circuit Court of Appeals affirmed the district court's decision, *Adams v. Cumberland Farms, Inc.*, 86 F.3d 1146. The 11 Petitioners sought review of that decision in this Court, which denied certiorari (No. 96-300) on November 4, 1996.

The district court in *Curley* approved the parties' class-wide settlement in that case in a Final Order and Judgment dated September 8, 1993. The 11 Petitioners appealed that judgment to the United States Court of Appeals for the Third Circuit, which affirmed it on May 19, 1994. *Curley v. Cumberland Farms, Inc.*, 27 F.3d 556 (3d Cir. 1994). Petitioners did not seek certiorari from that decision.

The Final Order and Judgment in *Curley* dismissed with prejudice all claims of the members of the settlement class which were or which could have been asserted in that case against CFI, its owners, directors, officers, employees, agents, attorneys, insurers or named insureds (the "Released Parties"), arising out of or in any way related to the class members' employment with CFI, and enjoined the class members from instituting or prosecuting any suits against the Released Parties arising out of

or related to their employment with CFI. In their brief to the Third Circuit, the 11 Petitioners explicitly recognized that the Final Order and Judgment in *Curley* constituted an injunction against further prosecution of their claims against CFI or any of the other Released Parties, by reason of the fact that they had filed proofs of claim in the bankruptcy proceeding. When the district court in *Curley* subsequently issued another order *specifically* enjoining these Petitioners and their attorney, Stanley R. Cohen, from continuing to prosecute the lawsuits against Respondents which are at issue here, the Petitioners again sought review of that order in the Third Circuit, which on January 25, 1995, denied their appeal and affirmed the injunction, *Curley v. Cumberland Farms Dairy, Inc.*, 47 F.3d 1160 (3d Cir. 1995). The 11 Petitioners did not seek certiorari from that judgment, either.

C. Decision of the District Court in This Case

Based on the foregoing history, the district court held that the claims of the 11 Petitioners are barred by the settlement in *Curley* (Petition at 8a). In addition, the court held that the ERISA and RICO claims of these 11 Petitioners, and one other (Van Winkle) were barred as a matter of *res judicata*, having previously been adjudicated and dismissed on the merits in one of the seven other lawsuits brought by the Petitioners (and with respect to Petitioner Cheryl Adams, these claims had been adjudicated and dismissed on the merits in two of the other seven lawsuits, *Adams I* and *Ring*) (Petition at 9a). The court dismissed the ERISA and RICO claims of the remaining Petitioners for the reasons set forth in its previous decisions in *Adams I* and *Ring*. *Id.* As an alternative ground for dismissing the ERISA and RICO claims of 13 of the remaining Petitioners, the court concluded that their claims were barred by the statute of limitations. The court dismissed the pendent state law claims of all but two of the remaining Petitioners as barred by applicable

state statutes of limitation. (Petition at 9a-11a). The court dismissed without prejudice the state law claims of Petitioner Nancy French, on the grounds that her claims had already been adjudicated and dismissed by the Massachusetts Superior Court, and were the subject of an appeal to the Massachusetts Appeals Court. (Petition at 11a).[2] The court dismissed without prejudice the state law claims of the one remaining Petitioner, Kathleen Martins, on the grounds that it would not be efficient to retain jurisdiction over the state law claims of one plaintiff. *Id.*[3]

D. Decision of the Court of Appeals

On September 4, 1996, the Court of Appeals summarily dismissed the appeals of the 11 Petitioners whose claims were extinguished by the settlement in *Curley*. The appeals of the remaining Petitioners were dismissed by the Court of Appeals, *per curiam*, on June 9, 1997, essentially on the grounds relied upon by the district court in its decision dated August 9, 1995.

After petitions for rehearing were denied by the Court of Appeals, this Petition followed.

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2. The Massachusetts Appeals Court subsequently affirmed the lower court's dismissal of French's claims, and French has not joined in this petition for certiorari.

3. Although Martins is named as one of the Petitioners herein, she did not appeal the district court's dismissal of her claims, and none of the Questions Presented or arguments in the petition address the reasons given by the district court for dismissal of her claims.

REASONS FOR DENYING THE WRIT

I.

CLAIMS OF THE 11 PETITIONERS ARE BARRED AS A MATTER OF *RES JUDICATA* BY THE FINAL JUDGMENT IN *CURLEY v. CUMBERLAND FARMS, INC.*, AND THIS COURT'S DENIAL OF CERTIORARI IN NO. 96-300.

Of the six Questions Presented in the petition, the second, third and fourth pertain only to the 11 Petitioners whose claims were extinguished by virtue of the settlement in the *Curley* case. The Court has already rejected a collateral attack on that settlement by these same 11 Petitioners. *Adams v. Cumberland Farms, Inc.*, 86 F.3d 1146 (1st Cir. 1996), *cert. denied*, 117 S. Ct. 387 (Nov. 4, 1996). Notwithstanding rejection of their first petition, these same 11 Petitioners brought a second petition for certiorari *Cheryl Adams v. Cumberland Farms, Inc.*, __ S. Ct. __, 1997 WL 274814 (Oct. 6, 1997), in which they attempted to relitigate these same issues, *i.e.*, validity of the *Curley* settlement as a bar to their claims. Respondents respectfully direct the Court to their Opposition to Petition For Writ of Certiorari in No. 96-1782, which sets forth the reasons why the doctrine of res judicata bars relitigation of the 11 Petitioners' attack on the final judgment in *Curley*. The 11 Petitioners should not be permitted a third bite at the apple.

The other arguments set forth in the petition (the first, fifth and sixth of the Questions Presented) pertain only to the remaining Petitioners, and are addressed only to the reliance by the courts below on the statute of limitations as grounds for dismissing the claims of the remaining Petitioners.

II.

THIS IS NOT AN APPROPRIATE CASE FOR THE COURT TO RESOLVE THE SPLIT AMONG THE CIRCUITS OVER WHEN A CIVIL RICO CLAIM ACCRUES FOR PURPOSES OF THE STATUTE OF LIMITATIONS BECAUSE: (a) THE DISTRICT COURT RELIED UPON OTHER GROUNDS, NOT ATTACKED IN THE PETITION, FOR ITS DISMISSAL OF THE PETITIONERS' RICO CLAIMS; AND (b) THE PETITIONERS DID NOT SQUARELY RAISE THIS ISSUE BELOW.

The remaining Petitioners argue that the Court should grant certiorari in this case to resolve a split among the courts of appeal regarding the proper rule for deciding when a civil RICO claim accrues, for purposes of the statute of limitations (Petition at 6-8). As the Court recognized in *Klehr v. A.O. Smith Corp.*, __ U.S. __, 117 S. Ct. 1984 (1997), the majority of the courts of appeal (including the First Circuit), apply the traditional "injury discovery" rule while three of the circuits apply what the Court described as the "injury and pattern discovery" rule.[4] *Klehr*, 117 S. Ct. at 1988-89. In the instant case, the remaining Petitioners urge the Court to resolve this split in the circuits by endorsing the "injury and pattern discovery" rule. However, the statute of limitations was but one of the grounds relied upon by the district court in this case for its decision to dismiss the RICO claims of the remaining Petitioners, and the petition does not assert that it was error for the district to dismiss the RICO claims on those

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4. In describing this split among the circuits, the Petitioners omit any mention of the D.C. Circuit's view on this issue, which is adverse to their position. *Compare* Petition at 6-7 and *Riddell v. Riddell Washington Corp.*, 866 F.2d 1480, 1489-90 (D.C. Cir. 1989) (applying the "injury discovery" rule).

other grounds. Thus, as in *Klehr*, this is not an appropriate case for the Court to resolve the split in the circuits over when a civil RICO claim accrues for purposes of the statute of limitations.

The district court's decision in this case states, in pertinent part:

> The RICO and ERISA claims asserted by other plaintiffs are also dismissed, based upon the reasoning relied upon by Judges Skinner and Harrington in *Adams v. Cumberland Farms, Inc., et al.*, No.91-10627-S, and *Ring, et al v. Haseotes, et al.*, No.93-10051H, in their respective decisions in those cases, dated July 29, 1992 and April 23, 1993.

Appendix to Petition, at page 9a.

The decision of Judge Harrington referred to in the passage quoted above is attached hereto as Appendix A. Among other reasons cited by Judge Harrington for dismissing the RICO claims in that case, he stated that the plaintiffs had failed to state a claim under RICO because "none of them allege an injury to a business interest or property related to a business." The district court adopted this as one of its reasons for dismissing the RICO claims of the remaining Petitioners in this case, and they have not asserted in their petition that it was error for the district court to do so. Thus, even if the Court were to resolve the split in the circuits by adopting the "injury and pattern discovery" rule, as the remaining Petitioners have requested, it would not change the outcome of this case as to these remaining Petitioners.

A further reason for denying certiorari in this case is that the remaining Petitioners never clearly and unequivocally raised this issue to the court below. In support of their contention that

there exists a split in the circuit courts of appeal on this issue, the petition cites the decision in *Rodriguez v. Banco Central*, 917 F.2d 664, 665-68 (1st Cir. 1990), in which the First Circuit followed the traditional "injury discovery" rule. Petition at pp. 6-7. In their brief to the First Circuit, the remaining Petitioners argued that the statute of limitations should be tolled in their favor because Respondents had "fraudulently concealed" their wrongdoing from the remaining Petitioners, but they did not urge the court of appeals to overrule its decision in *Rodriguez*, and in fact, no mention of *Rodriguez* or of any "RICO accrual rule" appears in their brief to the First Circuit. "It is hornbook law that theories not raised squarely in the district court cannot be surfaced for the first time on appeal." *McCoy v. MIT*, 950 F.2d 13, 22 (1st Cir. 1991), *cert. denied*, 504 U.S. 910, 112 S. Ct. 1939 (1992); *American Automobile Manufacturers Ass'n, et al. v. Commissioner, Massachusetts Dept. of Environmental Protection*, 31 F.3d 18, 25 (1st Cir. 1994).

The Court should not attempt to resolve the split among the courts of appeal over the appropriate rule for accrual of a civil RICO claim in a case like this, where the issue was not adequately presented to the lower court, and where resolution of this issue will not affect the rights of the Petitioners. Resolution should "wait for a case that clearly presents these, or related issues, providing an opportunity for full argument, before [it] attempt[s] to resolve them." *Klehr*, 117 S. Ct. at 1992.

III.

THE COURT SHOULD NOT CONSIDER THE LAST OF THE QUESTIONS PRESENTED IN THE PETITION BECAUSE THIS ARGUMENT WAS NOT RAISED BELOW.

Lastly, the remaining Petitioners argue that collateral estoppel bars the Respondents from raising the statute of

limitations as a defense to their claims. Their argument proceeds as follows: (a) the Respondents were parties to the final judgment in the Curley case; and (b) the issue of the statute of limitations was actually decided in that case, because it constituted a necessary component of the decision reached in that case.

However, this argument was never presented to the district court, and it was raised in the court of appeals for the first time in the Petitioners' reply brief. *American Automobile Manufacturers v. Commissioner*, 31 F.3d at 25; *Pignons S.A.de Mecanique v. Polaroid Corp.*, 701 F.2d 1, 3 (1st Cir. 1983):

> In preparing briefs and arguments, an appellee is entitled to rely on the content of an appellant's brief for the scope of the issues appealed, and appellant generally may not preserve a claim merely be referring to it in a reply brief or at oral argument.

The Court should not consider arguments which were not adequately presented to the lower courts.

Even if this argument had been adequately raised below, it is fundamentally flawed. The issue of whether the statute of limitations barred claims of the plaintiffs in *Curley* was never actually decided in that case, and since the final judgment in *Curley* merely approved a class-wide settlement of claims, the issue of the statute of limitations was not a necessary component of the final judgment of the district court.

Moreover, the Petitioner's collateral estoppel argument is flatly inconsistent with the rule set down by the Court in *American Pipe and Construction Co. v. Utah*, 414 U.S. 538, 554, 94 S. Ct. 756, 766 (1974), and *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 353-54, 103 S. Ct. 2392, 2397-98 (1983): class members who opt out of the class must begin their

individual actions within the time afforded by the statute of limitations, as extended by the finite tolling period between the initiation of the class action and the date that those members opted out. [5]

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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5. Thus, the decision cited by the remaining Petitioners in support of their collateral estoppel argument, *N.L.R.B. v. Donna-Lee Sportswear Co., Inc.*, 836 F.2d 31, 34 (1st Cir. 1987), is wholly irrelevant to this case.

APPENDIX A — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS IN THE MATTER OF *RONALD RING, et al. v. DEMETRIOS HASEOTES, et al.*, NO. 93-10051-H DATED APRIL 23, 1993

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO.: 93-10051-H

RONALD RING, *ET AL.*,

Plaintiffs

v.

DEMETRIOS HASEOTES, *ET AL.*,

Defendants.

MEMORANDUM AND ORDER

April 23, 1993

HARRINGTON, D.J.

Twelve Plaintiffs have brought suit in this case against 28 Defendant officers, agents, and employees of Cumberland Farms, Inc., pressing seven state and two federal claims. The Plaintiffs allege that the Defendants coerced them into signing false confessions and wrongfully discharged them. The action has come before the Court on the Defendants' Motion to Dismiss.

A court should dismiss a claim under Rule 12(b)(6) only when it appears that the plaintiff can prove no set facts in support

of his claim that would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). In making such a ruling, a court must accept all facts pleaded in the complaint as true, drawing all reasonable inferences in the plaintiff's favor. *The Dartmouth Review v. Dartmouth College*, 889 F.2d 13, 16 (1st Cir. 1989). A court need not, however, accept a plaintiff's "bald assertions, unsupportable conclusions, and 'opprobrious epithets.' " *Chongris v. Board of Appeals*, 811 F.2d 36, 37 (1st Cir.) (quoting *Snowden v. Hughes*, 321 U.S. 1, 10 (1944)), *cert. denied*, 483 U.S. 1021 (1987). As the First Circuit has indicated, there is a difference between well-pled factual averments and conclusory allegations:

> More often, facts are susceptible to objective verification. Conclusions, on the other hand, are empirically unverifiable in the usual case. They represent the pleader's reactions to, sometimes called "inferences from," the underlying facts. It is only when such conclusions are logically compelled, or at least supported, by the stated facts, that is, when the suggested inference rises to what experience indicates is an accepted level of probability, that "conclusions" become "facts" for pleading purposes.

The Dartmouth Review, 889 F.2d at 16. It is with these precepts in mind that we address the Plaintiffs' claims.

Eight of the Plaintiffs[1] assert claims under Section 510 of the Employment Retirement Income Security Act ("ERISA"),

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1. The Plaintiffs asserting ERISA claims are Cheryl Adams, Richard Waugh, Elizabeth Targee, Weldon Adams, Patricia Adams, Tina Levesque, Robert Ravitz, and Brent Adams.

29 U.S.C. § 1140 (1988). Section 510 makes it unlawful for any person to discharge a participant in an employee benefit plan "for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan [or ERISA]." 29 U.S.C. § 1140. No ERISA action lies, however, "where the loss of pension benefits was a mere consequence of, but not a motivating force behind, a termination of employment." *Titch v. Reliance Group, Inc.*, 548 F.Supp. 983, 985 (S.D.N.Y. 1982), *aff'd mem.*, 742 F.2d 1441 (2d Cir. 1983); *see also Gavalik v. Continental Can Co.*, 812 F.2d 834, 851 (3d Cir.), *cert. denied*, 484 U.S. 979 (1987) ("Proof of incidental loss of benefits as a result of a termination will not constitute a violation of § 510."). In their Amended Complaint, the Plaintiffs allege that the Defendants' "unlawful and tortious conduct resulted in [Cumberland Farms] illegally discharging them, pretextually, with the purpose of interfering with the rights and benefits to which they would have been entitled under [ERISA]." The Plaintiffs have not alleged any facts, however, to support their conclusion that the Defendants terminated them in order to interfere with their pension benefits. Because such a conclusory allegation, without more, is insufficient to state a claim under Section 510, the Plaintiffs' ERISA claims are dismissed pursuant to Rule 12(b)(6). *See Mercado Garcia v. Ponce Fed. Bank*, No. RLA 89-0949, 1991 WL 333729, at *5-6 (D.P.R. March 22, 1991); *Clapp v. Greene*, 743 F.Supp. 273, 277 (S.D.N.Y. 1990), *aff'd mem.*, 930 F.2d 912 (2nd Cir.), *cert. denied*, 112 S. Ct. 197 (1991).[2]

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2. Even if the Plaintiffs were able to state a claim, the claims of Plaintiffs C. Adams, Waugh, and Targee are time-barred. ERISA does not provide a specific statute of limitations for actions under Section 510; however, the applicable limitations period, as determined by reference to the Massachusetts statute of limitations governing those causes of actions most analogous to the one set forth in Section 510, is

(Cont'd)

Appendix A

The Amended Complaint also asserts claims on behalf of all the Plaintiffs under the Racketeer Influenced and Corrupt Practices Act ("RICO"), 18 U.S.C. § 1962(c) and (d) (1988). Subsection (c) of Section 1962 states, in relevant part:

> It shall be unlawful for any person . . . associated with any enterprise . . . [to] participate . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Subsection (d) of Section 1962 makes it unlawful to conspire to violate subsection (c). To state a claim under RICO, a plaintiff must allege injury to his "business or property by reason of a violation of section 1962." 18 U.S.C. § 1964(c) (1988). RICO was enacted to "cope with the infiltration of legitimate business" by organized crime. *United States v. Turkette*, 452 U.S. 576, 592 (1981). Cognizant of this primary purpose, courts have interpreted the phrase "business of property" to mean only commercial interests. *See, e.g., Hibbard v. Benjamin*, No. CIV. A. 90-10361-WF, 1992 WL 300838, at *3 (D. Mass. Sept. 21, 1992); *Van Schaick v. Church of Scientology of Cal., Inc.*, 535 F.Supp. 1125, 1137 (D. Mass. 1982). Although a few of the Plaintiffs allege loss of personal assets, none of them allege an injury to a business interest or property related to a business.

(Cont'd)

three years. *See Guiffre v. Delta Air Lines, Inc.*, 746 F.Supp. 238, 240-41 (D. Mass. 1990). C. Adams was terminated on February 8, 1989; Richard Waugh on February 28, 1989; and Elizabeth Targee on August 28, 1989. Thus, they were each terminated more than three years before the filing of this case in January of 1993. The Plaintiffs have alleged no facts to support their argument that the limitations period should be tolled under a theory of fraudulent concealment. *See Berkson v. Del Monte Corp.*, 743 F.2d 53, 55-56 (1st Cir. 1984), *cert. denied*, 470 U.S. 1056 (1985).

Because the Plaintiffs therefore fail to state a claim upon which relief may be granted under Section 1964(c), their RICO claims are dismissed.[3]

Having dismissed the Plaintiffs' federal RICO and ERISA claims, this Court declines to exercise supplemental jurisdiction over the remaining state law claims. 28 U.S.C. § 1367(c)(3) (Supp. II 1990). The Plaintiffs state law claims are therefore also dismissed. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966) ("[I]f the federal claims are dismissed before trial, . . . the state claims should be dismissed as well.").

The case is ordered dismissed as to all defendants.

s/ Edward F. Harrington
EDWARD F. HARRINGTON
United States District Judge

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3. Even if the Plaintiffs were able to allege a commercial injury, some of the Plaintiffs' RICO claims would still be deficient. A plaintiff must allege injury "by reason of" the alleged racketeering activities to state a claim. 18 U.S.C. § 1964(c). Here, the only conduct alleged in the Amended Complaint that would constitute racketeering activities are the alleged acts of extortion. *See* 18 U.S.C. § 1961(1)). While the following Plaintiffs press theories of wrongful termination and constructive discharge, they do not, however, allege that they were harmed by an act of extortion: Weldon Adams, Brent Adams, Patricia Adams, Tina Levesque, and Robert Ravitz. Because these five Plaintiffs cannot allege injury by reason of "racketeering activities," they do not state claims upon which relief can be granted under the RICO statute.

Further, the RICO claims of an additional three Plaintiffs — Burke, Rapa and Van Winkle — are barred by the applicable four year statute of limitations. *Agency Holding Corp. v. Malley-Duff & Assocs., Inc., Pa.*, 483 U.S. 143, 156 (1987). Plaintiff Rapa's cause of action arose in 1982, Plaintiff Van Winkle's in 1985, Plaintiff Burke's in 1987 — each more than four years before this suit was commenced in January, 1993. The RICO claims of these three Plaintiffs are accordingly time-barred.